SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 934

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

vs.

UEBERSEE FINANZ-KORPORATION, A. G.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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2 In the United States District Court for the District of Columbia

Civil Action No. 26453

UEBERSEE FINANZ-KORPORATION, A. G. LIESTAL, SWITZERLAND, PLAINTIFF

v.

JAMES K. MARKHAM, AS ALIEN PROPERTY CUSTODIAN, DEFENDANT

Complaint

Filed Oct. 25, 1944

Plaintiff by its attorneys, complaining of the defendant, alleges:

1. This action arises under the Fifth Amendment to the Constitution of the United States and the Trading With The Enemy Act, Act of October 6, 1917, 40 Stat. 411, as amended; U. S. C. Title 50, Appendix Sections 1 to 31, inclusive, as hereinafter more fully appears.

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

3. Plaintiff is a corporation organized in the year 1922 under the laws of the Confederation of Switzerland, has its principal office at Liestal, Switzerland, and is and always has been a citizen of Switzerland.

4. Plaintiff is not, nor at any of the times herein specified has been, an enemy or ally of enemy of the United States within the meaning of the Trading With The Enemy Act.

5. Plaintiff is not, nor at any of the times herein specified has been, a national of a designated enemy country.

6. On and prior to June 4, 1942, and continuously thereafter, plaintiff was and is the lawful owner of the following property:

(a) 345,760 shares of the common stock of Harvard Brewing Company (a Delaware Corporation), and all dividends
3 thereon since June 14th, 1942. (Described in Custodian's Vesting Order No. 17, dated June 14, 1942.)

(b) 73,039 shares of the common stock of Spur Distributing Company, Inc. (a Delaware Corporation), and all dividends thereon since June 14, 1942. (Described in Custodian's Vesting Order No. 14, dated June 14, 1942.)

(c) 100 shares of the common stock of Westminster Industrial Corporation (a New York corporation), and all dividends paid thereon since June 14, 1942. (Described in Custodian's Vesting Order No. 18, dated June 4, 1942.)

(d) 7,304 shares of the common stock of Ajax Transportation Company (a Missouri corporation), and all dividends thereon since June 30, 1942. (Described in Custodian's Vesting Order No. 36, dated June 30, 1942.)

(e) All right, title and interest of Uebersee Finanz-Korporation, A. G., (Overseas Finance Corporation, Limited) in and to that certain contract executed under the date of October 18, 1940 with Amerlagene, Inc., a Delaware corporation.

All income, profits and other property heretofore accrued or which may hereafter accrue to Uebersee Finanz-Korporation, A. G., (Overseas Finance Corporation, Limited) by virtue of the aforesaid contract dated October 18, 1940. (Described in Custodian's Vesting Order No. 51, dated July 11, 1942.)

(f) 300 shares of the common stock of Amerlagene, Inc., (a Delaware corporation) and all dividends thereon since June 4, 1942. (Described in Custodian's Vesting Order No. 19, dated June 4, 1942.)

7. On the following dates Leo T. Crowley, the predecessor in office of the defendant, caused to be executed the following numbered Vesting Orders respecting the property described in the indicated sub-sections of Paragraph 6, above:

Date	Vesting order No.	Description
6-14-42	17	See Paragraph 6 (a).
6-14-42	14	See Paragraph 6 (b).
6-4-42	18	See Paragraph 6 (c).
6-30-42	36	See Paragraph 6 (d).
7-11-42	51	See Paragraph 6 (e).
6-4-42	19	See Paragraph 6 (f).

8. Thereafter, in purported pursuance of said Vesting Orders the said Leo T. Crowley, without warrant of law and in violation of the Constitution of the United States, seized the property described in Paragraph 6 above, without the consent of the plaintiff.

9. At no time, at or since the dates mentioned in Paragraphs 7 and 8 above, has any of the property described in Paragraph 6 above, been owned, directly or indirectly, in whole or in part, by any person who was or is an enemy or ally of enemy within the meaning of the Trading With The Enemy Act.

10. At no time, at or since the dates mentioned in Paragraphs 7 and 8 above, has any of the property described in Paragraph 6 above, been owned, directly or indirectly, in whole or in part, by any person who was or is a national of a designated enemy country.

11. On May 27, 1943 plaintiff duly made and filed in triplicate with the defendant, a Notice of Claim with respect to the property described in Paragraph 6 above, in the form and containing the particulars required by the Alien Property Custodian.

12. Defendant and his predecessor have retained and defendant is now retaining the property described in Paragraph 6 hereof, without warrant of law and in violation of the Constitution of the United States.

Wherefore plaintiff demands:

(a) Judgment that it is entitled to the immediate possession of the property described in Paragraph 6 hereof.

(b) That a decree be entered directing the defendant to account for and deliver and transfer to plaintiff the property described in Paragraph 6 hereof, together with all dividends and avails thereof and all right, title and interest therein.

(c) Judgment for the costs of this action.

——— ———, *Plaintiff.*

By RICHARD J. CONNOR,
BART W. BUTLER,
Attorneys for Plaintiff,
821 15th Street NW., Washington 5, D. C.

* * * *

In United States District Court

Amendment to complaint

Filed Aug. 20, 1945

The Complaint in the above-entitled matter is hereby amended in the following particulars:

By amending Paragraph 7 to read as follows:

7. On the following dates Leo T. Crowley, the predecessor in office of the defendant, caused to be executed the following numbered Vesting Orders respecting the property described in the indicated sub-sections of Paragraph 6, above:

Date	Vesting Order No.	Description
6-14-42	17	See Paragraph 6 (a).
6-14-42	14	See Paragraph 6 (b).
6-4-42	18	See Paragraph 6 (c).
6-30-42	36	See Paragraph 6 (d).
7-11-42	51	See Paragraph 6 (e).
6-4-42	19	See Paragraph 6 (f).

and on August 6, 1942, issued an amendment of Vesting Order No. 17 and on July 11, 1944, the defendant issued an amendatory and supplemental order to Vesting Order No. 14.

By amending Paragraph 9 to read as follows:

9. At no time, at or since the dates mentioned in Paragraphs 6, 7 and 8 above, has any of the property described in

Paragraph 6 above, been owned or controlled, directly or indirectly, in whole or in part, by any person who was or is an enemy or ally of enemy within the meaning of the Trading with the Enemy Act.

By amending Paragraph 10 to read as follows:

10. At no time, at or since the dates mentioned in Paragraph 6, 7, and 8 above, has any of the property described in Paragraph 6 above, been owned or controlled, directly or indirectly, in whole or in part, by any person who was or is a national of a designated enemy country.

By adding a paragraph numbered 10 (a) reading as follows:

10 (a). At no time, at or since the dates mentioned in Paragraphs 6, 7 and 8 above, has any of the property described in Paragraph 6 above, directly or indirectly, in whole or in part, been owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of:

(i) An enemy or ally of enemy within the meaning of the Trading with the Enemy Act.

(ii) A designated enemy country within the meaning of the Trading with the Enemy Act or any executive orders issued pursuant thereto.

(iii) Any national of a designated enemy country within the meaning of the Trading with the Enemy Act or any executive orders issued pursuant thereto.

By adding a paragraph numbered 10 (b) reading as follows:

10 (b). At no time, at or since the dates mentioned in Paragraphs 6, 7 and 8 above, have any of the corporations whose names are stated in Paragraph 6 above been an enemy or ally of enemy within the meaning of the Trading with the Enemy Act or a national of a designated enemy country within the meaning of the Trading with the Enemy Act or any of the executive orders issued pursuant thereto.

7 By adding to the prayer for relief in said Complaint a subparagraph (d) reading as follows:

(d) Such other or further relief as is warranted in the premises.

* * * * * * *

In United States District Court,

Motion by defendant to dismiss the action

Filed Jan. 24, 1945

James E. Markham, Alien Property Custodian, the defendant in the above-entitled cause, moves the Court to dismiss the action herein because the complaint fails to state a claim upon which

relief can be granted inasmuch as it appears upon the face of the complaint that the plaintiff is a national of a foreign country whose property the Alien Property Custodian was authorized to vest under Section 5 (b) of the Trading with the Enemy Act, as amended by Title III of the First War Powers Act, 1941, and under Executive Orders 9095 and 9193.

HERBERT WECHSLER,
Assistant Attorney General,
HARRY LEROY JONES,
Chief, Alien Property Litigation Unit,
IRVING J. LEVY,
Chief Trial Attorney,
SAMUEL Z. GORDON,
Attorney,
War Division, Department of Justice,
Attorneys for Defendant.

JANUARY 24, 1945.

Of Counsel:
JOHN ERNEST ROE,
General Counsel to the Alien Property Custodian.

8 In United States District Court

Judgment

Filed Sept. 21, 1945

The defendant having moved the court to dismiss the motion herein on the ground that the complaint fails to state a claim upon which relief can be granted in that it appears upon the face of the complaint that the plaintiff was a national of a foreign country whose property the Alien Property Custodian was authorized to vest under Section 5 (b) of the Trading with the Enemy Act as amended by Title III of the First War Powers Act, 1941 and under Executive Orders Nos. 9095 and 9193, and said motion having come on to be heard before me on the 29th day of August, 1945, and after hearing counsel for both parties and due deliberation having been had herein, Now, therefore, it is

Ordered, Adjudged and Decreed that said motion is hereby granted and that the action herein be and it is hereby dismissed with costs to the defendant.

H. A. SCHWEINHAUT, *Justice.*

Dated September 21, 1945.

9 In United States Court of Appeals,
District of Columbia

Before Honorable D. Lawrence Groner, Chief Justice; Henry W. Edgerton, and E. Barrett Prettyman, Associate Justices

No. 9187, April Term, 1946

Uebersee Finanz Korporation, A. G., appellant

vs.

James E. Markham as Alien Property Custodian, appellee

Minute entry

May 28, 1946

Argument commenced by Mr. Richard J. Connor, attorney for appellant, continued by Mr. Herbert Wechsler, attorney for appellee, and concluded by Mr. Richard J. Connor.

10 [File endorsement omitted.]

In United States Court of Appeals, District of Columbia

No. 9187

Uebersee Finanz-Korporation, A. G., appellant

v.

James E. Markham, as Alien Property Custodian, appellee

Appeal from the District Court of the United States for the District of Columbia

Argued May 28, 1946—Decided October 21, 1946

Mr. Richard J. Connor, with whom Mr. Bart W. Butler was on the brief, for appellant.

Mr. Herbert Wechsler, Special Assistant to the Attorney General, with whom Mr. Harry LeRoy Jones, Special Assistant to the Attorney General, was on the brief, for appellee. Mr. Wallace H. Walker, Department of Justice, also entered an appearance for appellee.

Before GRONER, C. J., and EDGERTON, and PRETTYMAN, JJ.

Opinion

Filed Oct. 21, 1946

GRONER, C. J.: The decision in this case turns upon the question whether the amendment of § 5 (b) of the Trading with the Enemy Act by Title III of the First War Powers Act of 1941 has, by necessary implication, the effect of nullifying and rendering impotent § 9 (a) of the original Act.[1] Or, stated more concisely, whether the amendment of § 5 (b) in 1941, of itself and without more, renders inoperative the rights conferred under § 9 (a) of the original Act.

Appellant is a corporate national of Switzerland and at the outbreak of World War II was the owner of certificates of stock in sundry American corporations. The Alien Property Custodian, under authority of amendment § 5 (b) and under Executive Orders 9095 and 9193, seized appellant's property as the property of a "foreign country or national thereof" and vested the same in himself. Since precisely this procedure is authorized under that section, obviously no exception can be had to this. But at that point appellant, claiming the right to recover the vested property under the provisions of § 9 (a) of the Act, brought this suit, alleging, among other things, that before and at the time of the seizure it was a citizen of Switzerland; that it was not an enemy or ally of enemy; that it was not a "national of a designated enemy country"; and that the property was not then nor at any other time held for the benefit of an enemy or ally of enemy, nor for the benefit of a "national of a designated enemy country."

The Custodian filed a motion to dismiss on the ground that the complaint failed to state a valid cause of action, and the District Court, without opinion, granted the motion. From that action this appeal is taken.

The basis of the motion to dismiss is that it appears on the face of the complaint that appellant is a national of a foreign country

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[1] 50 U. S. C. War App. § 9 (a), 41 Stat. 977, provides: "Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property * * * conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him * * * may institute a suit in equity * * * in the district court of the United States * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian * * * or the interest therein to which the court shall determine said claimant is entitled."

50 U. S. C. Supp. V, War Apps., § 616, 55 Stat. 839, 840, amending § 5 (b) of the Trading with the Enemy Act, provides: "During the time of war * * * any property or interest of *any foreign country or national thereof* shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States. * * *." [Italics supplied.]

land, this being conceded, the Custodian insisted and now insists that under the amended § 5 (b) the vesting is absolute and not subject to attack.[2] To avoid conflict with the constitutional prohibition against the taking of property of friendly aliens without just compensation, which such a construction would raise, the Custodian suggests that appellant may obtain just compensation by way of suit against the United States in the Court of Claims. But that suggestion conflicts with § 7 (c) of the Act,[3] which provides—"The sole relief and remedy of any person having any claim to any money or other property * * * transferred * * * to the Alien Property Custodian * * * shall be that provided by the terms of this Act," i. e., § 9 (a). Thus appellant's right of recovery, if it has any, is limited by statutory terms to a suit under § 9 (a), for only to that extent and in that manner has the United States consented to be sued. Pflueger v. United States, 73 App. D. C. 364, 121 F. (2d) 732, *cert. den.* 314 U. S. 617; Sigg-Fehr v. White, 52 App. D. C. 215, 285 Fed. 949.

12 It will thus be seen that the Custodian's position is not only that the vesting of the property is within the authority delegated to him—which is not denied—but also that § 9 (a) of the Act, which specifically confers jurisdiction on the several district courts to entertain a proceeding to inquire into the question whether the seized property is owned by "an enemy or ally of enemy," and if not so owned, to order its return, is, since the passage of the amendment to § 5 (b), inapplicable in the case of property owned by any foreign national which has been seized by the Custodian.

The Custodian attempts to avoid the stark obliteration from § 9 (a) of the words "Any person not an enemy or ally of enemy", by saying that that section limits recovery to "the interest therein" of the claimant, and accordingly the Custodian insists there may be no recovery here because seizure under amended § 5 (b) destroys all interests of aliens in seized property. But there is nothing in § 5 (b) to sustain this view and to adopt it would read into that section words that are not there and at the same time, and with just as little warrant, read out the quoted words from § 9 (a). This

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[2] The language of amended § 5 (b) as to vesting is—"Such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States." And the position of the Custodian is that this language vests the property in the Custodian unqualifiedly and completely. The language used is broad, but it is no broader than the language used in the vesting provision of the original Act (Act of March 28, 1918, amending § 12 c. 28, 40 Stat. at L. 459-460), wherein the Custodian was given the power to sell and manage such property as though he were the absolute owner. But on a similar claim under that provision the Supreme Court, in Central Union Trust Co. v. Garvan, *infra*, said:

"All this may be conceded if no claim is filed. But this act did not repeal § 9, which is amended by the later Acts of July 11, 1919, chap. 6, 41 Stat. at L. 35, and of June 5, 1920, chap. 241, 41 Stat. at L. 977, and, as we have said, provides for immediate claim and suit, and requires the property in cases of suit to be retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result."

[3] 50 U. S. C. War App. § 7 (c).

assumes, we think, too much. In any event, to sustain the Custodian's position not only would require a major job of statutory reconstruction, but would also—as to the property of friendly aliens—raise grave doubts as to the constitutionality of the law. And this, of course, it is not permissible to do. See Becker Steel Co. v. Cummings, 296 U. S. 74; Stoehr v. Wallace, 255 U. S. 239; Central Union Trust Co. v. Garvan, 254 U. S. 554. In our view, what was said by the Supreme Court in the recent case of Markham v. Cabell, 326 U. S. 404, is conclusive against such action. In that case, as in this, the Custodian contended that the amendment to § 5 (b) armed the Executive with far more comprehensive powers over enemy property and the property of other foreign interests, including friendly and allied interests, than in World War I, and that the effect of this was to withdraw the right to sue explicitly granted by § 9 (a) should not be read out of the law. The Supreme Court said:[1] "We can find no indication in the 1941 legislation that Congress by amending § 5 (b) desired to delete or wholly nullify § 9 (a). On the contrary, the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole."

Read as we read them, § 5 (b) as amended and § 9 (a) do not conflict, but rather constitute a reasonable program to meet the emergency of war. Under the Act as it was in World War I, the seizure of alien property was limited to that of enemies, and the seizure was "after investigation." Thus, a determination of enemy ownership was a prerequisite to seizure.[2] A more expeditious procedure to assure quick protection of our economy against enemy influence was to seize initially all alien property, and then upon investigation and with the burden of producing the facts placed upon the claimant rather than upon the Custodian, to return the property of aliens not enemies. Amended § 5 (b) and § 9 (a) when read together, prescribe exactly that procedure.

The amendment of § 5 (b) did not nullify § 9 (a), nor was it inconsistent therewith. Indeed, it seems to us that the haste imposed by war required additional assurance against unwarranted seizure.

We have found nothing and reason suggests nothing to indicate that the dominant purpose of the Act—the elimination of enemy influence in our economy—has been changed, or that the calamity of war was to be used to eliminate and destroy all alien investment in the United States. Certainly, it cannot be urged that Congress intended to jeopardize, without adequate remedy, the billions of

[1] 326 U. S. 404–411.

[2] The Custodian says that a summary determination was sufficient. Whether summary or not, the statute made the investigation a preliminary and not a subsequent step to seizure.

dollars of allied and friendly nations' property merely because of its temporary presence in this country in time of war, and the purpose in the enlargement of § 5 (b) must necessarily have been to reach with confiscation only that portion tainted with an enemy interest. And that this is true is definitely shown, we think, in the fact that Congress has twice refused to write the Custodian's present construction into the law.[8] But even if that conjecture be dismissed, there is nothing to support the theory of the Custodian that the new legislation eliminated all remedy as to all foreign rights. For obviously, such a purpose would run headlong into constitutional objection.

Accordingly, it seems to us quite clear that neither the language of the amendments nor the policy of Congress, as shown by the revised legislation, contemplated the position taken by the Custodian here.[8] It follows, therefore, that the judgment below must be reversed and the case remanded for trial in accordance with the views expressed in this opinion.

Reversed and Remanded.

Dissenting opinion

EDGERTON, J., dissenting: Section 9 (a) still gives a remedy, as it always did, against unauthorized takings of property. But taking the property of a friendly alien is now expressly authorized by § 5 (b). As the court concedes, the property in suit "vested" in the Custodian. The vesting for which § 5 (b) provides is unqualified and complete. The property may be "used, * * * sold, or otherwise dealt with" by the Custodian. This precludes retention by appellant of any interest in the property.

The policy of § 5 (b) is clear. Nominal ownership by nominal neutrals is often a front for, or otherwise equivalent to, enemy control. Such arrangements are often hard to detect and usually harder to prove. To defeat them, Congress authorized the Custodian to vest in himself the property of any foreign national. It does not appear that they can be defeated otherwise.

I do not understand how § 9 (a) can be thought to give appellant a claim to recover property which is no longer his. The court states that § 9 (a) specifically confers jurisdiction to inquire whether seized property is owned by an enemy or ally of enemy, and if not so owned, to order its return. I cannot find this provision in § 9 (a). What this section, as I read it, specifically confers is jurisdiction to award to a claimant whose "interest" or "title" is "established * * * the * * * property * * * or the

[8] H. R. 4840, 78th Cong. 2nd Sess. (died in Committee). H. R. 5089, 79th Cong. 2nd Sess. (reintroduced as H. R. 6890, 79th Cong. 2nd Sess.), contained in § 33 provision that "a foreign * * * national * * * may not * * * maintain a suit pursuant to 9 (a) hereof." This section, together with an identical section contained in S. 2378, 79th Cong. 2nd Sess., was deleted and the remainder of the bill was passed.

interest therein to which the court shall determine said claimant is entitled." Appellant has no interest or title in the property in suit, since the property is vested unqualifiedly in the Custodian.

14 Compensation for the taking of the property is a different matter. The Tucker Act, 28 U. S. C. § 250, permits recovery in the Court of Claims on any claim "founded upon the Constitution of the United States or any law of Congress * * * [or] upon any contract, express or implied, with the Government of the United States * * *." And "it is settled by many decisions of which we need only cite the last—Yearsley v. Ross, 309 U. S. 18—that when the United States seizes the property of an individual, not an enemy, in pursuance of a public purpose, it impliedly promises to pay just compensation, and that that promise is 'just compensation' under the Fifth Amendment." Silesian-American Corp. v. Markham (C. C. A. 2d; decided July 3, 1946). The former owner's claim to compensation is not affected by the provision in § 7 (c) that "the sole relief and remedy of any person having any claim to any money or other property * * * transferred" shall be that provided by the Act, since a claim to compensation for the taking of property is not a claim to the property. Accordingly I see no constitutional difficulty in the statutory scheme.

15 In United States Court of Appeals for the District of Columbia

[File endorsement omitted.]

No. 9187—October Term, 1946

UEBERSEE FINANZ-KORPORATION, A. G., APPELLANT

vs.

JAMES E. MARKHAM AS ALIEN PROPERTY CUSTODIAN, APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Before GRONER, C. J., and EDGERTON and PRETTYMAN, JJ.

Judgment

Filed Oct. 21, 1946

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from this cause be, and the same is hereby, reversed and

that this cause be, and it is hereby, remanded to the said District Court for trial in accordance with the views expressed in the opinion of this Court.

Per Mr. Chief Justice GRONER.

Dated October 21, 1946.

Dissenting opinion by Mr. Justice EDGERTON.

19 United States Court of Appeals for the District of Columbia

[Title omitted.]

Order substituting party appellee

Filed Nov. 30, 1946

On consideration of the motion of Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, to substitute himself in the place and stead of appellee James E. Markham, as Alien Property Custodian, on the ground that effective October 15, 1946, the President of the United States terminated the Office of Alien Property Custodian and transferred its functions to the Attorney General, and the Attorney General having represented that there is substantial need for continuing the action and obtaining a final adjudication therein, and it appearing that appellee James E. Markham and appellant Uebersee Finanz-Korporation, A. G., consent to the motion to substitute, It is

Ordered by the Court that Tom C. Clark, Attorney General of the United States, be, and he is hereby, substituted as appellee in the place and stead of appellee James E. Markham, as Alien Property Custodian.

PER CURIAM.

Dated November 30, 1946.

[File endorsement omitted.]

21 [Clerk's certificate to foregoing transcript omitted in printing.]

22 Supreme Court of the United States

No. 934—October Term, 1946

Order allowing certiorari

Filed February 17, 1947

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE : 1947